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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/697,767	10/30/2003	Andrew Schydlofsky	15651-002001	8887

26191 7590 11/22/2010  
FISH & RICHARDSON P.C. (TC)  
PO BOX 1022  
MINNEAPOLIS, MN 55440-1022

EXAMINER
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WEISBERGER, RICHARD C

ART UNIT	PAPER NUMBER
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3693

NOTIFICATION DATE	DELIVERY MODE
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11/22/2010

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATDOCTC@fr.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/697,767	<b>Applicant(s)</b> SCHYDLOWSKY, ANDREW	
	<b>Examiner</b> Richard C. Weisberger	<b>Art Unit</b> 3693	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE three MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 26-29,31,33,34 and 46-49 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 26-29,31,33,34 and 46-49 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____.                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date ____.   | 6) <input type="checkbox"/> Other: ____.                          |

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## **DETAILED ACTION**

### **Reopening of Prosecution**

The following is a quotation of 37 C.F.R. 1.198 which forms the basis for reopening prosecution in this case:

*37 CFR 1.198 Reopening after a final decision of the Board of Patent Appeals and Interferences.*

When a decision by the Board of Patent Appeals and Interferences on appeal has become final for judicial review, prosecution of the proceeding before the primary examiner will not be reopened or reconsidered by the primary examiner except under the provisions of § 1.114 or § 41.50 of this title without the written authority of the Director, and then only for the consideration of matters not already adjudicated, sufficient cause being shown.<

The Board of Patent Appeals and Interferences reversed the examiner in the decision dated 8/3/2010. MPEP 1214.04 states, "If the examiner has specific knowledge of the existence of a particular reference or references which indicate nonpatentability of any of the appealed claims as to which the examiner was reversed, he or she should submit the matter to the Technology Center (TC) Director for authorization to reopen prosecution under 37 CFR 1.198 for the purpose of entering the new rejection."

The decision of 8/3/2010, noted, "Morrissette does not disclose that the ready to eat cereal therein disclosed is a powder. In addition, although Examiner may be correct that hot baby cereal may have a powdery form, Morrissette does not disclose hot baby cereal." As examiner has specific knowledge of "hot baby cereal in a powdery form", he is therefore in specific knowledge of the existence of a reference which indicated nonpatentability. Said knowledge has been presented to the TC director and detailed in the Office Action below.

Accordingly, A Technology Center Director has approved of reopening prosecution by signing below:

Wynn W. Coggins

Director, TC 3600

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***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 26-29, 31, 33, 34, and 46-49 are rejected under 35 U.S.C. 103(a) as being unpatentable by Morrisette *et al.* U.S. Publication No. 2002/0150658 (hereinafter, "Morrisette").

The applicant has presented a single argument to the previously issued 102 rejection. The applicant argues that the prior art fails to teach a dietary supplement comprising a powder. As discussed in the previous office actions, the reference teaches a packaged food product (the applicant's kit) comprising a package with two or more chambers, the two chambers are said to include a nutritional supplement and an additive, (Paragraph [0004]), as the applicant's specification teaches that a "dietary supplement product" can include any edible grocery item and that the base can be provided in any form such as a solid, semi-solid, liquid, or powder, thus indicating the form of the food supplement is merely a matter of design choice. The

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supplement product is said to comprise one or more of a protein, peptide, amino acid, carbohydrate, electrolyte, herb, or combinations thereof Paragraph [0010]. The prior art additive reads on a flavorant. Paragraph [0010].

The reference does not expressly teach the nutritional supplement in the form of a "powder". The reference does however teach that "the skilled artisan will appreciate that the present invention finds suitability for use in connection with a wide variety of foods products". Thus it would have been obvious for one skilled in the art at the time to have selected food product and additive combinations offer advantages that provide enhancement when the two compartments are interacted chemically or physically, see Paragraph [0004]. Accordingly, it would have been obvious for one skilled in the art at the time to have selected a nutritional product in a powdered form and an additive comprising a liquid flavorant from the group of fruits claimed as the problem solved by the prior art is providing a kit of two or more ingredients that are packaged separately but selected to be mixed at the time of consumption. Moreover, it would be obvious for one skilled in the art to have tried any number of combinations. Moreover, it would be a matter of common sense to have picked any number of combinations that could read on a powder and a flavorant. For example, the nutritional supplement could be a cake mix and the additive to be a liquid cherry flavorant. Moreover, it would have been obvious for one skilled in the art to have packaged this in a single serving as single servings are a well understood variable in the food industry. In addition it would have been obvious to add a second additive as this would just represent duplication of a known result.

### ***Conclusion***

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Richard C. Weisberger whose telephone number is 571 272 6753. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James Kramer can be reached on 571 272 6783. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Richard C Weisberger/  
Primary Examiner, Art Unit 3693

Richard C Weisberger  
Primary Examiner  
Art Unit 3693